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AIM EDITION SDN BHD v. AMBANK (M) BHD

COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
HANIPAH FARIKULLAH JCA
KAMALUDIN MD SAID JCA
B [CIVIL APPEAL NO: B-02(NCVC)(W)-2612-12-2018]
21 JANUARY 2020

CONTRACT: *Agreement – Breach – Contract of public auction – Breach of proclamation of sale of land – Sale of land by way of public auction – Successful*
C *bidder/purchaser paid purchase price and signed contract of public auction – Contract contained proclamation of sale which provided size of land – Discovery that true size of land less than what was stated in proclamation of sale – Whether there was contract between parties – Whether there was breach of terms of contract – Whether vendor failed to deliver auctioned land as stated in proclamation of sale –*
D *Whether purchaser entitled to claim for damages*

LAND LAW: *Sale of land – Public auction – Proclamation of sale of land – Breach of – Sale of land by way of public auction – Successful bidder/purchaser paid purchase price and signed contract of public auction – Contract contained proclamation of sale which provided size of land – Discovery that true size of land*
E *less than what was stated in proclamation of sale – Whether there was breach of terms in contract – Whether vendor failed to deliver auctioned land stated in proclamation of sale – Whether vendor, as chargee, liable to pay compensation for losses arising from any judicial sale by public auction – National Land Code, s. 269(3)*

F

The previous owner and chargor of a piece of land, had entered into a joint venture agreement with Cergas Tegas Sdn Bhd ('CTSB') for the development of the said land. Subsequently, CTSB entered into a loan agreement with the respondent, the chargee, for a facility of RM17 million and the land was charged as security. When CTSB defaulted in the repayment of the loan, the
G respondent proceeded with foreclosure proceedings for the sale of the land by way of public auction. The successful bidder ('appellant') purchased the land at RM120,000,000 and signed the contract of public auction which comprised, *inter alia*, a proclamation of sale. After paying the balance purchase price and registering itself as the proprietor of the land, the
H appellant appointed a consultant to inquire and inspect the condition of the land. According to the independent consultant, there was a school on the land. The appellant then appointed a surveyor to inspect and determine the actual size of the land. According to the surveyor, the true size of the land was less than what was stated in the proclamation of sale as, out of the land
I held under the original title, four titles have been issued while one was approved with the title yet to be issued. The appellant then commenced an

action at the High Court, against the respondent, premised on breach of contract for the respondent's failure to deliver the auctioned land as stated in the particulars of the proclamation of sale. The appellant sought for, *inter alia*, compensation sums for the four lots with titles and for the lot without the title. Dismissing the appellant's claim with costs, the trial judge held that (i) there existed no contract between the appellant and the respondent; (ii) the respondent, as the registered chargee, was not liable to pay compensation for losses arising from any judicial sale by public auction by reason of s. 269(3) of the National Land Code ('NLC'); (iii) the proclamation of sale made no representation as to the size of the land *per se* but merely set out the particulars of the title; (iv) the doctrine of caveat emptor was applicable; (v) cl. 23 of the conditions of sale in the proclamation of sale precluded the appellant's claim; and (vi) the appellant failed to prove damages or losses. Hence, the present appeal.

Held (allowing appeal with costs)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) In a forced sale pursuant to s. 256 of the NLC, the respondent being the chargee at whose instance the sale was effected was, or was to be regarded as, the vendor. There was a concluded contract between the appellant and the respondent. This was in accordance with settled law that the order for sale and the conditions of sale constituted a sale and purchase agreement between the respondent, being the chargee, as the vendor, and the appellant, being the successful bidder, as the purchaser. (paras 60 & 62)

(2) The trial judge erred in law in holding that the registered chargee was not liable to pay compensation for losses arising from any judicial sale by public auction by reason of s. 269(3) of the NLC. Section 269(3) of the NLC does not exempt a chargee from liability for compensation for the losses arising from any judicial sale by public auction. Section 269(3) of the NLC, clearly provides, *inter alia,* that any chargor or purchaser who suffers any loss of damage by reason of any act, omission, neglect, error or default arising under this Chapter shall be entitled to such compensation as may be determined by the court. 'Chapter' refers to Chapter 3 on Remedies of Chargees: Sale. (para 63)

(3) The trial judge erred in law and in fact when he decided that the proclamation of sale made no representation as to the size of the land *per se* but merely set out the particulars of the title. The trial judge's findings had no basis because he failed to consider the express terms set out in the proclamation of sale. It was very clear and undisputed that the proclamation of sale stated that the size of the land was 94.76 hectares. This was an express term of the contract under the heading of 'Butir-

A Butir Hakmilik' and was specifically agreed on between the parties when they entered into the contract. However, the appellant only received 81.9945 hectares and not 94.76 hectares as stated in the proclamation of sale. The evidence provided by SP3 during the trial was not challenged. The difference in the size of the land was confirmed by, B amongst others, the physical inspection conducted by the independent consultant appointed by the appellant on the said land. It was also supported by the contemporaneous documents in the form of land survey reports and plans prepared for the land title which was confirmed by the land office. (paras 64 & 65)

C **(4)** The 'as is where is basis' principle was inapplicable to this case since the particulars of title in the proclamation of sale that the actual size of the land did not correspond with 94.76 hectares as stated in the particulars of title in the proclamation of sale. The size of the said land was an express term of the contract. There was nothing to show that the D size of the said land was other than what was proclaimed in the proclamation of sale. The respondent failed to provide the size of the land in accordance with the express term stated in the proclamation of sale, which was 94.76 hectares. (paras 66 & 68)

(5) The trial judge's decision, that the doctrine of caveat emptor was E applicable, was not correct. Furthermore, the court did not agree with the judge's decision that cl. 23 of the conditions of sale in the proclamation of sale precluded the appellant's claim. Clause 23 was entirely inapplicable. It was not the appellant's case that there were any easements, caveats, tenancies *etc* in respect of the said land or that the F said land was not correctly described. The appellant's case was that the land offered to be sold was of size 94.76 hectares but the appellant only got 81.9945 hectares *ie* 12.7655 hectares less. There was a breach of condition of sales on the different land area sold to the appellant. The existence of cl. 23 in the proclamation of sale may be contrary to G s. 269(3) of the NLC which clearly provides protection to chargor or purchaser who suffers any loss or damage by reason of any act, omission, neglect, error or default arising from the sale shall be entitled to such compensation as may be determined by the court. (paras 69 & 73)

H **(6)** The appellant was entitled to damages for the loss suffered. There was sufficient evidence for arriving at the quantum of damages. The computation of the loss suffered could be done simply by way of pro-rating *ie* by dividing the purchase price of the said land with the size of the said land, 94.76 hectares. Based on 20,000,000 (purchase price) = I RM1,266,357.11 per hectare 94.76 hectare (size of the said land) the appellant's loss for the overlapping lots was RM16,165,681.80. (para 74)

Case(s) referred to:
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***
Azharin Shaari v. Tabung Haji Properties Sdn Bhd [2013] 10 CLJ 122 HC ***(refd)***
Kuala Lumpur Finance Bhd v. Yap Poh Khian & Ors [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75 HC ***(refd)***
Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1989] 1 LNS 115 HC ***(refd)***
Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor [2003] 2 CLJ 505 CA ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Ranjit Singh Jarnail Singh v. Malayan Banking Bhd [2015] 1 CLJ 908 FC ***(refd)***
Richard Curtis & Co Sdn Bhd v. Khatijah Abdul Majid [2012] 7 CLJ 878 HC ***(refd)***
Santhi Krishnan v. Malaysia Building Society Bhd [2015] 1 CLJ 1099 CA ***(refd)***

Legislation referred to:
National Land Code, ss. 89, 256, 258(2), 259, 268A, 269(3), 396(2)
Rules of Court 2012, O. 35 r. 5

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 42, p 47
Sarkar on Evidence, vol 2, 14th edn, p 2006

For the appellant - Porres Royan, Alan Chua Hock Kwang & Geraldine Kenel; M/s Alan Chua & Co
For the respondent - Vijay Kumar Natarajan, Chan Chew Weng & N Nathan; M/s Natarajan

[Editor's note: For the High Court judgment, please see AIM Edition Sdn Bhd v. AmBank (M) Bhd [2019] 9 CLJ 127 (overruled).]

Reported by Najib Tamby

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] This is the appellant's appeal against the decision of the High Court at Shah Alam delivered on 22 November 2018 where the appellant's claim was dismissed with costs of RM100,000.

[2] The cause of action against the respondent in the High Court was on contract. The appellant contended that the respondent had breached their contract with the appellant when they failed to deliver the auctioned land as stated in the particulars of the proclamation of sale.

Background Facts

[3] The background facts in the present case as provided by the appellant in his written submission is not disputed by the respondent. We adopted the facts stated therein and for easy reference, we reproduced the facts as follows:

(i) SAP Holdings Berhad ("SAP") was the previous owner of the land held under PN 89881 Lot No: 72916 Bandar Selayang, Daerah Gombak, Selangor (hereinafter referred to as the "said land") and which was also the chargor of the said land.

(ii) SAP and Cergas Tegas Sdn. Bhd. ("Cergas") entered into a joint venture agreement dated 12 January 1991 for the development of the said land. Subsequently, on 6 July 1994, Cergas (the borrower) entered into a loan agreement with the respondent (the chargee) which was previously known as Arab-Malaysian Finance Berhad for a facility of RM17,000,000.

(iii) The said land was charged on 6 July 1994 as security for the bridging loan between SAP, the chargor and the chargee.

(iv) Thereafter, Cergas entered into a supplemental loan agreement on 21 September 1995 with the chargee. However, Cergas defaulted on the said loan and hence, the chargee proceeded with foreclosure proceedings for the sale of the said land by way of public auction.

(v) There were a few scheduled auctions before the auction held on 11 November 2016. The public auction was held in the premises of the High Court at Shah Alam on 11 November 2016 for the sale of the said land with a reserve price of RM120,000,000.

(vi) This public auction was advertised in the newspaper three days before the said auction. Particulars of the said land are as follows:

Title No.:	PN 89881
Lot No.:	Lot 72916
Town/District/State:	Selayang/Gombak/Selangor Darul Ehsan
Land Area:	94.76 Hectares
Tenure:	Leasehold 99 years (expiring on 25th June 2090)
Quit Rent:	RM307,970.00
Category of Land Use:	Building
Registered Owner:	Shah Alam Properties Sdn Bhd
Express Condition:	Building construction in accordance with JPBD Negeri Selangor
Restriction In Interest:	This land cannot be transferred, leased or charged unless with the permission with the State Authority

Encumbrances:	Charged to AMFINANCE BERHAD *vide* Presentation No. 30638/1994, registered on 21st July 1994
Endorsement:	(i) Private caveat by AmBank (M) Berhad *vide* Presentation No. 47730/ 2011 dated 15th September 2011. (ii) Form 7A was issued by the Gombak Land Administrator through Presentation No. 867969/2016 served on 30th August 2016 and registered on 20th October 2016. (iii) Shah Alam High Court Originating Summons No. BA-24-687-07/2016

(vii) A representative of the appellant attended the auction.

(viii) Pursuant to the conditions of sale, the representative of the appellant registered himself and placed a bank draft amounting to RM12,000,000 (hereinafter referred to as "10% deposit of the reserve price") in the name of the respondent in the auction box identified by the High Court.

(ix) The appellant was the successful bidder on the day of the auction and purchased the said land at RM120,000,000. Subsequently, the representative of the appellant signed the Contract of Public Auction which consists of the following documents:

(a) memorandum;

(b) the proclamation of sale; and

(c) conditions of sale.

(x) Thereafter, the appellant paid the balance purchase price on 3 March 2017 by way of two banker's cheques to the respondent's then solicitors. The appellant registered itself as the proprietor of the said land after the receipt of the certificate of full payment and the order for sale pursuant to ss. 268A and 259 of the National Land Code respectively.

(xi) An independent consultant was appointed by the appellant to inquire and inspect the condition of the said land as well as to create the topography plan. The independent consultant determined that there was a school situated on the said land.

(xii) After the said discovery, the appellant then appointed an independent surveyor to inspect and determine the actual size of the said land.

A (xiii) The independent surveyor determined that the true size of the said land is less than what is stated on the proclamation of sale as out of the land held under the original title, four other titles have been issued and one approved with title yet to be issued.

B (xiv) As such, the appellant commenced the instant action and prayed for the following:

(a) a compensation sum of RM1,057,028.30 for Lot 3350 GM876;

(b) a compensation sum of RM3,077,247.80 for Lot PT35818 HS(D) 33584;

C (c) a compensation sum of RM4,825,833.70 for Lot PT35819 HS(D) 35585;

(d) a compensation sum of RM4,612,072.60 for Lot PT 1512 HS(D) 58390;

D (e) a compensation sum of RM2,593,499.40 for the lot without the title but which has been approved by the Gombak Land Office;

(f) interest at a rate of 5% per annum on the total sum of RM16,165,681.80 from the date of filing of the writ of summons and the statement of claim until the date of full

E settlement; and

(g) costs

(xv) By an order dated 22 November 2018, the learned High Court Judge dismissed the appellant's claims with costs of RM100,000.

F **Decision Of The High Court**

[4] The issues before the High Court as stated in the High Court grounds of judgment are as follows:

(i) whether there is a contract between the plaintiff and the defendant?

G (ii) whether the defendant breached the said contract?

(iii) whether the plaintiff suffered a loss?

(iv) Whether the "as is where is basis" principle is applicable?

H (v) Whether the rule of "caveat emptor" is applicable?

(vi) whether condition 23 is applicable?

[5] After hearing submission of both parties, the learned High Court Judge (learned judge) made his analysis and finding as follows:

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Analysis and Finding

[14] From the evidence led by both parties, it was clearly shown and also undisputed that the whole purchase price (deposit of 10% and balance of 90%) was paid by the Plaintiff to the Defendant. On this basis, it was contended by the Plaintiff that there was a contract between the Plaintiff and the Defendant as otherwise the purchase price would not have been paid to and received by the Defendant.

[15] In essence, the crux of the present claim is that there is a concluded contract between the Plaintiff and the Defendant. This is purportedly in accordance with settled law that an order for sale and the conditions of sale constitute a sale and purchase agreement ('SPA') between the chargee as the vendor and the successful bidder as the purchaser.

[16] On the primary issue of whether there was a subsisting contract between the Plaintiff and the Defendant the Plaintiff relied on the proposition that the Proclamation of Sale, the Memorandum and Terms of Sale as well as the Borang 16F were the documents that collectively constituted a contract between the Plaintiff and the Defendant as per Paragraph 13 of the Statement of Claim whereas the Defendant contended that a perusal of these 4 documents would clearly show that this property was sold by the Registrar and not the Defendant. The Defendant also pointed out that even the instrument of transfer (Form 16F) was executed by the Registrar and not the chargee. Further, that:

> There was not a single document that the Plaintiff had relied upon it its pleadings that showed that the Defendant was the Vendor. Therefore, it is clear that no contract between the Plaintiff and the Defendant for sale of the property even exists in the first place.

[17] Among the important facts that emerged from the evidence regarding the sale by auction in this case are as follows. In the cross examination of DW1 by the Plaintiff's counsel, the line of questioning seemed to suggest that the Plaintiff concedes that the Defendant is not the vendor of the subject property. Second, the alleged documents of contract as pleaded do not disclose any role by the Defendant in the auction. Hence, no contractual nexus between the Defendant and the Plaintiff was shown in the transaction that took place. Moreover, the Proclamation of Sale ('POS') expressly refers to the sale by the Registrar and not by the Defendant.

[18] On the whole, the fundamental elements necessary under the law of contract for the formation of an enforceable agreement or contract are absent in this case on the facts relating to the present judicial sale by public auction. In short, the Defendant never offered any property for sale, not being the vendor, which means that there was no question of the Defendant's offer having been accepted by the Plaintiff for the formation of a valid contract between them.

[19] The proposition that the registered chargee shall not be liable to pay compensation for losses arising from any judicial sale by public auction conducted under the provisions of the NLC is fortified by the words of Section 269(3) of NLC which read:

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> Notwithstanding anything contained in this Act or any other written law, the State Authority, any local authority, any chargor or purchaser who suffers any loss or damage by reason of any act, omission, neglect, error or default arising under this Chapter shall be entitled to such compensation as may be determined by the Court.

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[20] Proceeding to the issue of the alleged breach of contract by the Defendant, what the Plaintiff claims here is that the sale was for 94.76 hectares but that effectively, there has been encroachment on the land, hence cutting down its effective size by approximately 12.7655 hectares and hence, the Plaintiff is entitled to be compensated. This is reflected in

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paragraph 19 of the SOC which states, *inter alia*, that:

> ... kerana saiz hartanah yang sebenar yang dimiliki oleh Plaintiff adalah kurang daripada yang dinyatakan di Pengisytiharan Jualan.

[21] At this juncture, it is important to note that the POS make no representation as to the size of the land *per se* but merely sets out the

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particulars of the title. As pointed out by the Defendant, the POS has accurately set out the particulars of the title which remain unchanged and undisputed up to today.

[22] The Plaintiff's basic contention on this point is that the POS described the land as being of 94.76 hectares and this was a term of the

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alleged composite contract which the Defendant says is a fundamental error and baseless presumption. The answer to this dispute could be found in what the POS says under the heading 'Particulars of Title'. There is indisputably no error in the Particulars of Title in the POS, which is an agreed and admitted document in this case under Part A, relating to the title number and size/area of the land – 94.76 acres.

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[23] On the alleged breach of contract by the Defendant, the Plaintiff's case was that there was a representation by the Defendant *vide* the POS that the land offered for sale by public auction comprised 94.76 acres. As contended by the Plaintiff this is an incorrect interpretation given to the POS as what was stated in the POS was merely the details of the title

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without any representation as to the actual area of the land. Apart from the details of title in the POS, there was no evidence by the Plaintiff that there was any other representation made by the Defendant to this effect.

[24] On this ground, the Defendant contended that the Plaintiff had not discharged its onus of proof to prove this allegation by reference to

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Section 101, Evidence Act, 1950 which provides that:

> 101 Burden of Proof
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> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

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> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lied on that person.

[25] To conclude on this point, the crucial point is that, what the POS recites is the Particulars of Title of No. 89881 and that until today remains accurate and correct.

[26] In any event, Clause 6 of the Conditions of Sale in the POS explicitly places the responsibility on the purchaser/vendor to ascertain the essential details of the subject property and ensure that the encumbrances and liabilities on the same are accurate. PW1 did not dispute Clause 6 but instead claimed that as the auction was set to take place in 3 days he did not have the time to probe further to ascertain the actual size of the land offered for sale. As such, it would not be incorrect to say that there was a voluntary assumption of risk on the Plaintiff's part that the description of acreage in the particulars of title may not have corresponded with the actual size on site (in view of the presence of schools and overlapping titles).

[27] Importantly, it is undeniable that there was no representation or communication via the recitation of the Particulars of Title in the POS that the actual size of the land would correspond with the 94.76 hectares stated in the Particulars. In view of the risk that the Plaintiff took to purchase the property on an 'as is where is' basis, they should be estopped from claiming otherwise.

[28] From the evidence and circumstances surrounding the auction sale, there can be no doubt that the sale that took place was on the above basis where the doctrine of caveat emptor would apply. In the context of the instant case, the maxim requires that the purchaser is bound to view and inspect the land and make all searches at his own peril. If he does not. In the event that the actual acreage is found to be lesser than what is stated, he has to the consequences of his failure or omission on the title, the charge, even if it is regarded as the Vendor, cannot be held to be liable to the purchaser who offers to purchase the land on the said basis.

[29] The fact of the sale being on the aforesaid basis is fortified by Clause 23 of the Conditions of Sale which for convenience is reproduced below:

> 23. Hartanah yang Berjaya dilelong adalah dipercayai dan akan dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua Ismen (easement), kaveat, tenansi, tanggungan, bebanan (encumbrances) dan hak (jika ada) yang wujud di atas atau terhadapnya yang timbul untuk mentakrif is masing-masing dan tiada kesilapan kenyataan yang salah atau deskripsi yang salah akan membatalkan penjualan dan tiada bayaran gantirugi yang akan dibuat.

[30] Clause 23 is clear and unambiguous in its terms. As the land is being sold subject to the various interests mentioned therein, which would include titles issued on plots of land within the subject property, it would appear to preclude the Plaintiff's present claim based on a similar situation. Secondly, no misstatement or misdescription would have the effect of annulling the sale nor would the purchaser be entitled to compensation for the same. From the wording the Clause 23, the Plaintiff's proposition that it only applies in respect of the right to annul the sale is clearly misconceived as the clause provides 2 rights to the seller as adverted to.

A [31] I also upheld the Defendant's contention that, from the proven facts in this case and PW1's admission that it was their responsibility to ascertain that the description of the land size was accurate but chose not to do for the sake of commercial expediency would clearly give rise to an estoppel by conduct. Hence, the Plaintiff cannot now found his claim on a shortfall in the land area. Reference was made to the *locus classicus* on
B this area of the law, *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331 where the Federal Court held:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and
C has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[32] The Federal Court went on to say:

> The doctrine may be used to enlarge or reduce the rights or
D obligations of a party under a contract:
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> (1) *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA 203;
>
> (2) *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84.

E [33] Lastly, on the question of whether the Plaintiff had proven its damages as pleaded, suffice to say that no evidence was led and no witness was called to prove the monetary value of the shortfall and that the alleged shortfall acreage in monetary terms was worth RM16,165,681.80. It is trite law that a party claiming substantial damages is under a duty to prove that he suffered damages or losses, both the fact
F and quantum. It must be noted that in this case there is no prayer for damages to be assessed. Reference needs to be made to only Augustine Paul in *Evidence Practice & Procedure* 4th Ed. At page 159:

Duty on party claiming damages.

Before any award for damages can be made the party claiming it must
G prove both the fact of damage and the amount of damages.

Per Ong Hoch Thye FJ (as he then was) in *Guan Soon Tin Mining Co v. Wong Fook Hun* [1969] 1 MLJ, 99 (FC):

The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover.
H Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne &*
I *McGregor on Damages* (12th Ed.) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel Ltd* (1948) 64 TLR 177 at 178:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages.' They have to prove it.

(See also *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holding Sdn. Bhd.* [1994] 3 MLJ 777).

Conclusion

[34] To sum up, upon considering the pleadings, the evidence in its totality and the contentions of both parties through counsel, the Court finds as follows on the Plaintiff's claim.

[35] The claim is primarily founded on breach of contract, specifically for breach of the terms and conditions contained in the Proclamation of Sale ('POS') as to the actual size of the land purchased by P at the public auction (the subject land) conducted in accordance with the provisions of the National Land Code.

[36] Bearing in mind the law and established principles on burden of proof in civil actions, the onus lies wholly on P to prove the existence of a binding and enforceable contract between the two parties in this case. The outcome of this case depends primarily on the determination of this core issue.

[37] The sale in this case of the subject property is indisputably a judicial sale pursuant to an Order For Sale ('OFS') made by the High Court under the National Land Code ('NLC'). In obtaining the OFS, the Defendants/ Chargee Bank was exercising its statutory rights under the NLC.

[38] It is settled law that in a judicial sale by public auction, the Chargee Bank in exercising its statutory rights is not regarded as the Vendor in the sale. Hence, there is no relationship of Vendor and Purchaser between P and D in this case. It follows that there was, therefore, no contractual relationship between the parties in respect of the subject property. The Vendor would be the High Court which carried out the sale through the Registrar.

[39] Secondly, the purchaser is bound by the terms in the Proclamation of Sale upon making the offer to purchase the subject property. *Inter alia*, apart from stating the particulars of the title, there is no representation that the whole of the 94.76 hectares, without any structures/fixture of the land was offered for sale. It was a sale on an 'as is where is' basis subject to all encumbrances and interest.

[40] In the circumstances, as the existence of a contract between the parties has not been established and in view of the undisputed conditions of sale, P has clearly failed to prove the very basis of its pleaded claim on a balance of probabilities. This claim has, accordingly, to be dismissed with costs.

[41] Costs assessed in the sum of RM100,000.00, subject to allocator, to be paid by the Plaintiff to the Defendant.

[see pp. 23-35 grounds of judgment]

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Grounds Of Appeal

[6] The appellant raised 12 grounds of appeal in the memorandum of appeal dated 27 March 2019 saying that the learned trial judge erred in fact and in law when he dismissed the appellant's claim with costs. We summarised the grounds as follows:

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(i) when he held that no contract existed between the appellant and the respondent;

(ii) when he failed to appreciate that there was a contract between the appellant and the respondent;

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(iii) when he held that the registered chargee is not liable to pay compensation for losses arising from any judicial sale by public auction by reason of s. 269(3) of the National Land Code;

(iv) when he decided that the proclamation of sale made no representation as to the size of the land *per se* but merely set out the particulars of the title;

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(v) when he decided that the doctrine of caveat emptor was applicable;

(vi) when he held that cl. 23 of the conditions of sale in the proclamation of sale precluded the appellant's claim;

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(vii) when he held that the appellant failed to prove the damages or loss suffered by the appellant;

(viii) when he failed to consider at all the unchallenged and/or uncontradicted evidence of SP2;

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(ix) when he failed to consider the facts and/or evidence by SP1 during the inspection on site in accordance with O. 35 r. 5 of the Rules of Court 2012; and

(x) when he failed to consider that the title in question was a final title.

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The Appeal

[7] At the outset, we were informed by the appellant's counsel that the issues raised in this appeal are basically similar issues argued before the learned trial judge except one particular new issue that condition 23 of the proclamation of sales is contrary to s. 269 of the National Land Code.

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[8] Both parties had filed their respective written submissions and also made oral submissions before us.

The Appellant's Submission

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Whether There Is A Contract Between The Appellant And The Respondent?

[9] The appellant submitted that the learned trial judge erred in law when he decided that there was no contractual nexus between the appellant and the respondent on the basis that:

(i) the respondent is not the vendor of the subject property;

(ii) there were no documents to disclose any role by the respondent in the auction; and

(iii) the proclamation of sale expressly refers to the sale by the Registrar and not by the respondent.

[10] It was submitted that in a forced sale pursuant to s. 256 of National Land Code, the respondent being the chargee at whose instance the sale is effected is or is to be regarded as the vendor. Besides that, the order for sale and the conditions of sale are to be regarded as the sale and purchase agreement in a forced sale pursuant to s. 256 of the National Land Code. The appellant referred to the case of *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] 1 LNS 115; [1990] 1 MLJ 317, where VC George J (as he then was) held at p. 319:

> **In a forced sale pursuant to section 256 of the National Land Code, the chargee at whose instance the sale is effected is to be regarded as the vendor.**
>
> ... The sale takes place in terms of the order for sale made and the conditions of sale imposed in accordance with the order and any determination thereunder by the registrar of the court. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, **the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement.** (emphasis added)

[11] The above proposition was endorsed by the Court of Appeal, in the case of *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor* [2003] 2 CLJ 505; [2003] 4 MLJ 447 where Abdul Aziz Mohamad JCA (as he then was) held at p. 513 (CLJ); p. 455 (MLJ):

> In the case of an order for sale of land charged under the National Land Code, VC George J (as he then was) held in *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the chargee as vendor and the purchaser. Likewise I would regard the order for sale and the sale conditions in this case as the sale and purchase agreement between the respondents and the purchaser.

[12] The above two decisions were referred to with approval by the Court of Appeal in *Santhi Krishnan v. Malaysia Building Society Bhd* [2015] 1 CLJ 1099, wherein ldrus Harun JCA (as he then was) held at p. 1106 and p. 1112 as follows:

> [11] It is **settled law** that in **a forced sale pursuant to s. 256 of the National Land Code, the chargee at whose instance the sale is effected is to be regarded as the vendor.** The order for sale and the conditions of sale are to be regarded as the sale and purchase agreement (see *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989]1 LNS 115; [1990]1 MLJ 317 and *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor* [2003]2 CLJ 505; [2003]4 MLJ 447.

A [30] ... Thus, **even though the conditions for sale is based on the Practice Directions of the Registrar of the High Court, in law it is made by the chargee pursuant to s. 258(2) of the National Land Code.** The Practice Directions are intended to facilitate the imposition of the term and conditions of sale and ensure consistency and uniformity of practice by the High Court throughout Peninsula Malaysia. But the conditions of
B sale derives its legal force from s. 258(2) and the order for sale made pursuant to ss. 256 and 257 of the National Land Code. (emphasis added)

[13] Furthermore, the representative of the appellant during examination in chief confirmed that he signed the memorandum on behalf of the appellant and a copy of the Public Auction Contract was given to him. This is stated
C in exh. WSP1 p. 3, questions and answers no. 15 and 16 which read as follows:

Q15: What happen next?

A 15: The auction begun approximately at 10.30 a.m. and I was the only bidder. Therefore, I was pronounced as the successful bidder of the
D said Land. The court officer provided in the Memorandum for me to sign on behalf of the Plaintiff Company as stated in page 2 of the Common Bundle of Document, Part B and a set of the documents was given to me.

Q16: What documents was given to you?

E A 16: A copy of the Public Auction Contract which includes the Memorandum, Proclamation of Sale and Conditions of Sale.

See: Witness Statement of Er Ka Wei dated 23.05.2018 (pages 48-52 of RIP – Volume 2).

[14] The purchase price (consisting of the deposit of 10% and the balance
F of 90%) was paid by the appellant to the respondent. If there was no contract between the appellant and the respondent, the purchase price would not have been paid by the appellant and neither would the purchase price have been received by the respondent. Reference is made to the evidence of SP1 and SD1 as follows:

G (a) PIP: This 120 million was paid to whom?

SP1: Ambank (M) Berhad

PIP: All the amounts paid?

SP1: Yes the full sum of it has been paid to Ambank (M) Berhad

H See: Notes of Proceedings dated 23.5.2018 (page 70 of RIP-Supplementary Records of Appeal).

(b) PIP: Harga rizab okay, can you tell the court to which party is the 10% deposit supposed to be paid to? According to this harga rizab.

SD1: The 10% to be paid to the name of AMBANK BERHAD.

I PIP: Further the balance of 90%?

SD1: The balance of 90% is to be paid to AMBANK BERHAD

See: Notes of Proceedings dated 01.06.2018 (pages 211 to 212 of RIP-Supplementary Records of Appeal)

[15] Even though the conditions for sale are based on the Practice Directions of the Registrar of the High Court, it was submitted that in law, it is made by the respondent, the chargee pursuant to s. 258(2) of the National Land Code. This is because the Registrar is merely an agent of the chargee who is the true vendor.

[16] In the case of *Kuala Lumpur Finance Bhd v. Yap Poh Khian & Ors* [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75, Lim Beng Choon J held at p. 84 as follows:

> Under a forced sale of a land subject to a charge pursuant to s. 256 of the National Land Code, the fact that the sale is conducted by the Court or its Registrar does not mean that the Court or its Registrar has an interest in the sale or any dispute arising therefrom. **The Registrar/ licensed auctioneer sells the property as an agent of the chargee who is the real vendor.** (emphasis added)

[17] Therefore, the appellant submitted that there is a concluded contract between the appellant and the respondent. This is in accordance with settled law that the order for sale and the conditions of sale constitute a sale and purchase agreement between the respondent being the chargee as the vendor and the appellant being the successful bidder as the purchaser.

Registered Chargee Is Not Liable To Pay Compensation For Losses Arising From Any Judicial Sale By Public Auction By Reason Of s. 269(3) Of The National Land Code

[18] The appellant referred to s. 269(3) of the National Land Code which reads as follows:

> Notwithstanding anything contained in this Act or any other written law, the State Authority, any local authority, any chargor or purchaser who suffers any loss of damage by reason of any act, omission, neglect, error or default arising under this Chapter shall be entitled to such compensation as may be determined by the Court.

[19] The appellant submitted that the learned trial judge erred in law when he held that the registered chargee is not liable to pay compensation for losses arising from any judicial sale by public auction by reason of s. 269(3) of the National Land Code. The learned judge clearly erred in law. This is because s. 269(3) of the National Land Code does not exempt a chargee from liability for compensation for the losses arising from any judicial sale by public auction.

The Proclamation Of Sale Made No Representation As To The Size Of The Land Per Se But Merely Set Out The Particulars Of The Title

[20] The appellant submitted that the learned trial judge erred in law and in fact when he decided that the proclamation of sale made no representation as to the size of the land *per se* but merely set out the particulars of the title. This is because the learned trial judge failed to consider:

A (i) the express terms set out in the proclamation of sale; and

(ii) the evidence provided by SP3 during the trial which was unchallenged and/or uncontradicted.

[21] On the express terms set out in the proclamation of sale, it was
B submitted that the proclamation of sale did represent the size of the said land namely 94.76 hectares. This was an express term of the contract as it was clearly stated in the proclamation of sale, particularly under the heading of "Butir-Butir Hakmilik" and thus was specifically agreed on between the parties when they entered into the contract. However, in actual fact, the
C appellant only received 81.9945 hectares and not 94.76 hectares.

[22] The evidence provided by SP3 during the trial will show that:

(i) After the appellant purchased the said land, an independent consultant was appointed by the appellant to inquire and inspect the condition of the said land as well as to create a topography plan. In the course of his
D work, the independent consultant discovered that there was a school in the said land.

See: The topography plan (pp. 278-284 of RIP – Vol. 3B)

(ii) Thereafter, an independent surveyor who is also the appellant's expert
E witness, SP3 was appointed sometime at the end of May 2017 to calculate whether the size of the said land stated in the proclamation of sale corresponds with that was bought by way of the public auction in the High Court of Shah Alam on 11 November 2016 and his findings are stated in his report.

F See: Jurukur Bandardesa Report dated 19 November 2017 (pp. 266-316 of RIP – Vol. 3B)

(iii) In his report, SP3 inspected the topography survey plan by Jurukur Perunding Services Sdn Bhd and he discovered that a school was built inside the said land at the southern part of the lot, specifically PT35818
G HS(D) 35584. Subsequently, he went to the said lot and took some pictures of the school. There, he discovered that the said school was operating since year 2005.

See: Pictures of the school (pp. 293-295 of RIP – Vol. 3B)

H (iv) SP3 then advised the appellant to investigate further at the Gombak Land Office. During the inquiry, the officer, Encik Badrul had given SP3 and SP1 (the appellant's representative) a copy of the land charting plan which clearly shows that there were slots on the said land.

See: The land charting plan (p. 296 of RIP – Vol. 3B)

I (v) Based on the land charting plan, SP3 conducted certified true copies searches of the lots stated in the said land charting plan which are as follows:

(a) Lot 3530 GM 876 registered on 4 March 2002

(i) This CTC search states that this lot is a continuing land title of EMR 4169 Mukim Batu which was first registered on 19 November 1918;

(b) PT35818 HS(D) 33584 registered on 9 February 2000;

(c) PT35819 HS(D) 35585 registered on 9 February 2000;

(d) PT1512 HS(D) 58390 registered on 8 June 2006;

(e) An approved application for Sekolah Agama, in which land title is yet to be registered.

See: Certified true copies searches (pp. 297-310 of RIP – Vol. 3B)

(vi) Thereafter, on 16 June 2017, the appellant submitted an official letter to the Gombak Land Office for clarification on the overlapping land.

See: Official letter to the Gombak Land Office dated 16 June 2017 (p. 311 of RIP – Vol. 3B)

(vii) On 19 July 2017, a meeting was held at the Gombak Land Office. During the said meeting, Pesuruhjaya Tanah Persekutuan ("PTP") showed the appellant's representative three land titles namely PT35818 HS(D), PT35819 HS(D) 35585, PT1512 HS(D) 58390. The said land titles are the same as the certified true copies of the land searches that were conducted. Furthermore, in the meeting, Majilis Perbandaran Selayang's representative brought a copy of the pre-computation plan (hereinafter referred to as "pre-comp plan"). The pre-comp plan US/2262/00/A/5 was prepared by Ukur Sekitar (a licensed land surveying firm) in 2 November 2000 and was endorsed by Jabatan Perancang Bandar dan Desa (Town and Country Planning Department) in 17 January 2001 for Cergas. The purpose of the pre-comp plan is to subdivide Phase 1C into smaller lots for housing and commercial developments.

See: Pre-comp plan (p. 313 of RIP – Vol. 3B)

At the conclusion of the said meeting, Pejabat Tanah Daerah ("PTD") Gombak admitted that the said land overlaps with five other lots.

(viii) From the above discovery, SP3 then determined the size of the overlapping land by the AutoCAD software to compute the land area. The computation are as follows:

Item	Land Title	Date of Registration	Area (Hectare)	Remarks
(i)	Lot 3530 GM876	04.03.2002	0.837	Agriculture Land
(ii)	PT35818 HS(D) 35584	09.02.2000	2.43	Primary School
(iii)	PT1512 HS(D) 58390	09.02.2000	3.8108	Primary School/ Secondary School
(iv)	PT35819 HS(D) 58390	08.06.2006	3.642	Secondary School
(v)	No Title but it is confirmed that is has been approved by the Gombak Land Office	–	2.048	Religious School
	TOTAL		12.7655	Overlapping Land

(ix) It is noted that the methodology used by the appellant's expert witness, SP3 to calculate the area of the five overlapping lots was not challenged by the respondent during the trial.

(x) In *Sarkar on Evidence,* vol 2, (14th edn) at p. 2006 stated as follows:

> The skillful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken as an acceptance of the truth of that part of the witness' evidence. **If he asks no question, he will be taken to accept the witness's account** (*Flanagan v. Fahy* [1918] 2 IR 361 at page 388-389 (CA)) ...
>
> (emphasis added)

(xi) As such, it is to be noted that the methodology used by the appellant's expert witness, SP3 to calculate the area of the five overlapping lots was not challenged by the defendant during the trial. Therefore, it is taken to accept SP3's account as stated in *Sarkar on Evidence,* vol 2 (Refer to TAB 6 IA/P) as well as in the case of *Aik Ming (M) Sdn. Bhd. & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 at p. 71) and *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 at pp. 110 and 115).

The "As Is Where Is Basis" Principle Is Applicable

[23] The appellant submitted that the learned trial judge erred in law and in fact when he held that the "as is where is basis" principle is applicable in the present case on the basis that there was no representation or communication *via* the recitation of the particulars of title in the proclamation of sale that the actual size of the said land would correspond with 94.76 hectares as stated in the particulars of title in the proclamation of sale. The appellant's submission on this matter are as follows:

(i) The size of the said land is an express term of the contract.

(ii) Before bidding for the said land, a land search was conducted and all the particulars of title including the size of 94.76 hectares correspond with the particulars of title stated in the proclamation of sale. Reference is made to exh. WSP1 p. 2, question and answer No. 9 and 10 which reads as follows:

Q9: What did you do after having sight of the proclamation of sale?

A9: I contacted a few friends and we agreed to use my company to bid for the said land. Simultaneously, we made a search on the said land to confirm the particulars of title of the said land.

Q10: What did the land search state?

A10: The particulars of title corresponds with the particulars of title stated in the proclamation of sale.

See: Witness statement of Er Ka Wei dated 23 May 2018 (p. 49 of RIP – Vol. 2).

(iii) Further, it is worthy to note that the appellant's expert witness, SP3 testified that there was no acquisition exercise over the said land, to give rise to the overlapping lots. Reference is made to the notes of evidence dated 23 May 2018 which read as follows:

P/D: There was no acquisition?

SP3: No acquisition.

See: Notes of proceedings dated 23 May 2018 (p. 132 of RIP– supplementary records of appeal)

(iv) In the case of *Azharin Shaari v. Tabung Haji Properties Sdn Bhd* [2013] 10 CLJ 122 (hereinafter referred to as the "*Azharin* case") (Refer to TAB 9 IA/P) See Mee Chun JC held at p. 127 as follows:

> [11] ... Although the land was sold on the basis of "as is where is" the area represented for sale was 55.25 acres. It was on that premise plaintiff made his offers and subsequently accepted defendant's offer. It does not lie on defendant to say that "as is where is" meant plaintiff bought the land represented to be 55.25 acres when it 5 turned out to be 29.5 acres. There is no obligation

A on plaintiff to do a search on the land size when the offer was clear the area was for 55.25 acres in respect of 688 lots. Further there was no indication at the material time of any master titles. There was nothing to show the land size was other than what was shown in the advertisement and defendant's offer ...

B (v) Based on *Azharin*'s case, the appellant therefore submitted that the "as is where is basis" principle does not apply herein because there is nothing to show that the size of the said land is other than what was proclaimed in the proclamation of sale. Thus, the respondent cannot now hide behind this principle for failing to provide the size of said land in accordance with the express term stated in the proclamation of sale, that is, 94.76 hectares.

C

The Doctrine Of Caveat Emptor Is Applicable

[24] The appellant submitted that the learned trial judge had erred in law and in fact when he held that the doctrine of caveat emptor is applicable in D the present case. This is because the learned trial judge failed to consider:

(i) the unchallenged and/or uncontradicted evidence of SP2;

(ii) the facts and/or evidence presented by SP1 during the trial; and

E (iii) the facts and/or evidence presented by SP1 during the inspection in accordance with O. 35 r. 5 of the Rules of Court 2012.

[25] The respondent relied on condition 6 of the conditions of sale which reads as follows:

F Penawar adalah bertanggungjawab untuk mengenalpasti butir-butir hartanah dan memastikan segala tanggungan serta bebanan hartanah adalah tepat

[26] The respondent also pleaded that they are entitled to rely on the professional valuers' report. Reference is made to SD1's evidence as follows:

G PIP: So the financial institution is entitled to rely on professional valuer and I'm saying that and then you relied on this particular document is it correct?

SD1: Yes.

PID: For what? At what point in time?

H PIP: At the time you auction the property?

SD1: Yes

See: Notes of proceedings dated 1 June 2018 (p. 215 of RIP – supplementary records of appeal)

I

[27] Based on the valuation report by SP2, the valuation was conducted for the said land bearing titled land area of 94.76 hectares. In this report, it clearly states that Sekolah Kebangsaan Bandar Baru Selayang 2 (Title No: PT35818 HS(D) 35584) forms part of the surrounding land and not the said land. This piece of evidence was unchallenged and/or uncontradicted. Thus, it is deemed admitted. Reference is made to the notes of evidence dated 1 June 2018 which reads as follows:

PIP: That is why I am asking you that the school does not form part of the land?

SD1: Yes

PIP: Is it correct?

SD1: It doesn't form.

PIP: According to this valuation?

SD1: Yes.

See: Notes of proceedings dated 1 June 2018 (pp. 216 to 217 of RIP – supplementary records of appeal)

[28] A close look at the valuation report particularly the aerial view of the said land confirms that the said school forms part of the said land and this corroborates the appellant's expert witness, SP3's report which is once again unchallenged and/or uncontradicted.

See: *Sarkar on Evidence,* Vol 2, (14th edn) at p. 2006

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639; [1995] 2 MLJ 770 at p. 71

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609; [1995] 1 MLJ 281 at pp. 110 and 115

[29] Furthermore, the learned trial judge also failed to consider that SP1, as a prudent purchaser had:

(i) conducted a Registry search on the said land; and

(ii) conducted a physical inspection on the said land but was not allowed to enter the said land by the security guard stationed at the entrance of the said land as stated in the valuation report by SP2.

[30] In accordance with *Halsbury's Laws of England,* 4th edn. vol 42 at p. 47 (Refer to TAB 10 of IA/P), caveat emptor is defined as follows:

The rule is caveat emptor; a purchaser should make inspection and inquiry as to what he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition: and although as a

A general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.

[31] Further, in *Richard Curtis & Co Sdn Bhd v. Khatijah Abdul Majid* [2012] B 7 CLJ 878 (hereinafter referred to as the "*Khatijah*'s case") Asmabi Mohamad JC (as she then was) held at p. 899 as follows:

> [60] However the plaintiff chose not to inquire about the size of the subject land. The maxim caveat emptor "let the buyer beware" requires that the plaintiff as the purchaser to be cautious as the risks was his and C not that of the defendant. A prudent step or precaution to be undertaken by a purchaser such as the plaintiff was to make a survey of the subject land to ascertain its size. However, if the plaintiff opted not to take this precaution it could not now fault the defendant for the shortfall in the size of the subject land. Hence, the principle of caveat emptor and or "let the buyer beware" would apply to the factual matrix of this case.
>
> D Please note: In *Khatijah*'s case, the subject matter of the land is a HS(D) title where the final measurement has not been done.

[32] In relation to the land search, the appellant submitted that they are entitled to rely on the said land search as particulars on the said land corresponds with the particulars of the said land stated on the proclamation E of sale.

(i) In relation to the inspection, the appellant submitted that they had no choice but to inspect the said land based on the surrounding land as the appellant was not allowed to enter into the said land by the security F guard stationed at the entrance of the said land as stated in the valuation report by SP2.

(ii) Besides, the learned trial judge also failed to consider the evidence and/or facts presented by SP1 during inspection in accordance with O. 35 r. 5 of the Rules of Court 2012.

G (iii) During the said inspection, SP1 confirms that he surveyed the said land from two points that are:

(a) from the entrance of the said land; and

(b) from the hilltop.

H (iv) Evidence was also presented during the said inspection to illustrate that the school was not visible from the hilltop of the said land.

(v) Therefore, the appellant submitted that the learned judge erred in law and in fact when he held that the doctrine of caveat emptor is applicable I in the present case as he failed to consider all the evidence presented beforehand.

Clause 23 Of The Conditions Of Sale In The Proclamation Of Sale

[33] The appellant submitted that the learned judge erred in law and in fact in holding that cl. 23 of the conditions of sale in the proclamation of sale precluded the appellant's claim.

[34] It is the appellant's submission that this clause is entirely inapplicable. It is not the appellant's case that there were any easements, caveats, tenancies etc in respect of the said land or that the said land was not correctly described. The appellant's case is that the said land offered to be sold was of size 94.76 hectares but the appellant only got 81.9945 hectares ie, 12.7655 hectares less (or 13.48% less).

Title In Question Is Not A Final Title

[35] Section 89 of the National Land Code was referred to by the appellant which reads as follows:

> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence:
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document

[36] Further, s. 396(2) National Land Code reads as follows:

> *Any plan approved by the Director of Survey and Mapping under paragraph (e) of sub-section (1) shall be filed in his office and (without prejudice to the operation of section 49 in the case of land subsequently affected by any advance of the shore-line or of the bed of any river) shall be conclusive evidence of the boundaries, boundary marks and area of the land to which it refers and *prima facie* evidence of the lot number thereof
>
> *Applicable to Malacca and Penang only

[37] The appellant submitted that the title in question is not a final title. This is because, in accordance with s. 89 of the National Land Code, the conclusiveness does not deal with the size of the land but rather conclusiveness as to the:

(i) title/lot number;

(ii) name of the proprietor; and

(iii) conditions and restrictions in interest.

[38] Although s. 396(2) of the National Land Code deals with conclusiveness of the land area, it is important to note that this sub-section only applies to Malacca and Penang. Thus, it is not applicable herein.

[39] Furthermore, there was a title to the said land registered as early as 1918 under the then applicable legislation. Subsequently, the schools were registered before the existing title to the said land was registered in 2011. SP3 stated the same in his witness statement. Reference is made to WSP3 question and answer 31:

Q31: When was the four titles registered?

A31: (i) Lot 3530 GM876 was registered on 4 March 2002, which originated from EMR 4169, which was first registered in 19 November 1918;

(ii) PT35818 HS(D) 35584 was registered on 9 February 2000;

(iii) PT35819 HS(D) 35585 was registered on 9 February 2000;

(iv) PT1512 HS(D) 58390 was registered on 8 June 2006.

See: Witness statement of Sr Loh Sow Kam dated 23 May 2018 (p. 57 of RIP – Vol. 2).

[40] Therefore, the appellant submitted that the title in question is not a final title as a survey in accordance with s. 396 of the National Land Code has yet to be conducted as well as the conclusiveness of the title in question does not deal with the size of the land but rather other requirements as stated in s. 89 of the National Code.

Whether The Appellant Suffered A Loss?

[41] It is the appellant's case that it has suffered a loss as it purchased the said land at RM120,000,000 for 94.76 hectares. However, as mentioned above and in actual fact, the appellant only received 81.9945 hectares.

[42] The appellant computed the loss suffered by way of pro-rating ie, by dividing the purchase price of the said land with the size of the said land, 94.76 hectares which is simple mathematical calculation. Details of the computation are as follows:

(i) Purchase price of the said land is RM120,000,000;

(ii) Size of per hectare based on the balance purchase price of the said land stated in (i)

(a) 20,000,000 (purchase price) = RM1,266,357.11 per hectare 94.76 hectare (size of the said land)

(iii) The appellant's loss for the overlapping lots is RM16,165.681.80, details of which are as follows:

Item	Lot	Acreage (Hectare)	Amount (RM)
(i)	Lot 3530 GM876	0.837	1,057,028.,30
(ii)	PT35818 HS(D) 35584)	2.43	3,077,247.80
(iii)	PT135819 HS(D) 35585	3.8108	4,825,833.70
(iv)	PT1512 HS(D)58390	3.642	4,612,072.60
(v)	No Land Title but it has been confirmed that it has been approved by the Gombak Land Office	2.048	2,593,499.40
	Total		16,165,681.80

[43] As such, it is to be noted that the computation of the appellant's loss by SP1 and SP3 was not challenged by the respondent during the trial. Therefore, it is deemed to be admitted.

See: *Sarkar on Evidence* vol 2, (14th edn) at p. 2006 (Tab 6 of IA/P)

Aik Ming (M) Sdn. Bhd. & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639; [1995] 2 MLJ 770 at p. 71

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609; [1995] 1 MLJ 281 (Tab 8 of IA/P at pp. 110 and 115)

[44] Premise on the foregoing submissions, the appellant submitted that the learned judge had erred in law and in fact when he dismissed the appellant's claim with costs of RM100,000. Thus, the appellant prays that the appeal herein would be allowed with costs.

The Respondent's Submission

[45] On the issue whether there is a contract, the respondent submitted that the law is clear that the action founded on contract could not be sustained. This is because the learned judge in the grounds of judgment at para. [16] (p. 23 Rekod Rayuan Tambahan) stated the documents relied upon by the appellant clearly showed that the property was sold by the Registrar and not the respondent.

[46] Furthermore, pursuant to cross-examination, the appellant conceded the respondent was not the vendor of the property (para. [17] grounds of judgment, rekod rayuan tambahan p. 24). Thus, based on the pleading ie, para. 13 of the statement of claim, there was no contractual nexus between the appellant and the respondent.

[47] The string of cases dealing with the issue of whether there is a contract between the chargee and the successful bidder at an auction were fully ventilated before the learned judge in the submissions. The conclusion to be drawn was that the chargee could not be considered to be the vendor as stated in the earlier decision on the matter but rather a public auction is merely a judicial sale conducted by the court. The issue was settled by the Federal Court in *Ranjit Singh Jarnail Singh v. Malayan Banking Bhd* [2015] 1 CLJ 908; [2016] 1 MLJ 165.

[48] Furthermore, the Federal Court in *Ranjit Singh Jarnail Singh v. Malayan Banking Bhd* [2015] 1 CLJ 908; [2016] 1 MLJ 165 in affirming the Court of Appeal decision in the same case held:

> [13] The same issues raised before the Court of Appeal were ventilated before us by the Appellant. As stated earlier, the Court of Appeal held there was no contract between the Appellant and the chargee bank …

[49] The law as it stand is therefore clear that there is no contractual nexus between the chargee bank and a bidder at the auction and thus any action based on contract will naturally fail *in limine*. The learned judge is therefore correct in holding so. Thus, the issue as to whether a chargee bank enforcing its rights by statutory sale gives rise to a contract between the bidder and the chargee bank is settled law. No contract exists between the parties *inter se*. On these grounds alone, this appeal should be dismissed as the appellant/plaintiff's claim was entirely founded on contract.

[50] The appellant claims the actual land purchased was lesser than that stated in the title. The learned judge correctly held notwithstanding there was no contractual nexus between the parties, what was offered for sale was a piece of land held under a particular title. There was no representation that a piece of land of any particular size was being offered for sale. The particulars of title were and are at all times correct as reflected in the register of titles. Hence, the learned judge's finding in para. [21] of His Lordship's grounds of judgment are correct. (See: p. 26 rekod rayuan tambahan). In short, there was no error in the particulars of title. The learned judge also held there was no other evidence of any representation on the area of the land.

[51] The respondent submitted that there is clear evidence the land was sold on an as-is-where-is basis. Furthermore, the learned judge correctly held that cl. 23 of the conditions of sale were clear and unambiguous in that no misdescription would amount the same and neither would the purchaser be entitled to any compensation for the same (misdescription). Further thereto, the learned judge held the appellant had conceded it was his duty to ascertain the size and area of the land but did not do so for reason of commercial expediency. As such, the learned judge correctly held that estoppel applied.

[52] On the claim for damages, the respondent submitted that no evidence of the value of the shortfall area was led by the appellant. No witnesses were called to ascertain or establish the value of the land that comprised the shortfall. The learned judge's treatment of the burden of proof in his grounds of judgment at para. [33] of his grounds of judgment are correct in law and approach.

[53] In conclusion, the respondent submitted that there is no error in the trial judge's interpretation of the law nor the learned judge's appreciation of the facts that merit appellate intervention. This appeal is devoid of merit and should be dismissed with costs.

Our Decision

[54] We heard the appellant's and the respondent's submissions and referred also to their written submissions. We have dealt with each ground raised in the submissions. After deliberation, we found merit in the appellant's submission. Hence, it was our unanimous decision that the appellant's appeal is allowed with costs of RM120,000 here and below subject to allocatur. The appellant is entitled to judgment as prayed in the statement of claim.

[55] The facts in this case are not disputed particularly where there was a proclamation of sale and the appellant was the successful bidder. The proclamation of sales is at pp. 248 to 253 of the Appeal Record Part C, (Vol. 3A) which consists of particulars of title and importantly showing provisional land area is 94.76 hectares. There are also 26 conditions of sales stated therein. The appellant's complaint that in effect they purchased the auctioned land with the land area of 81.9945 hectares ie, 12.7655 hectares less (or 13.48% less). Therefore, they are entitled to damages on the different value of the land area. The appellant's case is that the respondent as the chargee bank/vendor has breached the contract and must be held liable to compensate the appellant.

[56] The main issue is whether there is a contract between the appellant and the respondent. The respondent relied heavily on the Federal Court in *Ranjit Singh Jarnail Singh v. Malayan Banking Bhd, supra*, where it was submitted that the Federal Court agreed with the Court of Appeal decision in the same case which held that, there was no contract between the appellant and the chargee bank. In other words, the chargee bank could not be considered to be the vendor but rather a public auction is merely a judicial sale conducted by the court.

[57] We have read the grounds of judgment of the Federal Court in *Ranjit Singh Jarnail Singh v. Malayan Banking Bhd*, *supra*. In our view, the case can be distinguished on facts. The facts in the said case are different from the facts in this present case. In the said case, the property could not be transferred

and registered to the appellant due to the private caveat entered by the daughter of the chargor about two months prior to the appellant having paid the full price. Although a certificate of sale was issued to the appellant by the court, the sale could not be completed. Since the certificate of sale could not be registered due to the existence of the caveat and would never be capable of being registered until the end, the title or interest of the property still remained with the chargor. Thus, the appellant could not become the registered proprietor of the property not because the chargee bank had breached the terms of the judicial contract, but because the order for sale was set aside some nine years later. Arguably, there was no breach of contract caused by either party (chargee bank and the appellant bidder) to the condition of sale. In view of that, the Federal Court agreed with the respondent that since the order for sale was set aside, the judicial contract dated 12 September 1990 became null and void, ie, no contract was struck between the respondent and the appellant, and the appellant had been put back to his original position, which means his position before the judicial contract took place (see paras. [19] of the said judgment).

[58] Further it was held that:

> [20] It is our judgment that since there was no breach of contract on the part of the chargee bank, the issue of monetary compensation as claimed by the appellant does not arise …
>
> [21] Since it is our finding that that there was no breach of contract in the first place to entitle the appellant to initiate this suit, in our considered view the claim for damages by the appellant must also fail.

[59] Following the above judgment, it can also be a case that had the court found the order for sale was not set aside, the judicial contract dated 12 September 1990 would be valid and contract was struck. Had a certificate of sale was issued to the appellant by the court and the certificate of sale was registered, the title or interest of the property would be transferred to the appellant. If there is breach of condition of sales, the appellant being the registered proprietor of the property could take action against the chargee bank for breach of terms of the judicial contract.

[60] Therefore, we entirely agreed with the appellant's submission. In our view, the law still stands that in a forced sale pursuant to s. 256 of National Land Code, the respondent being the chargee at whose instance the sale is effected is or is to be regarded as the vendor. The order for sale and the conditions of sale are to be regarded as the sale and purchase agreement between the respondents and the purchaser (see: *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] 1 LNS 115; [1990] 1 MLJ 317; *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor*. Thus, even though the conditions for sale are based on the Practice Directions of the Registrar of the High Court, in law, it is made by the chargee pursuant to s. 258(2) of the National Land Code (see; *Santhi Krishnan v. Malaysia Building Society Bhd*)

[61] In the case of *Kuala Lumpur Finance Bhd v. Yap Poh Khian & Ors* [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75, it was held that under a forced sale of a land subject to a charge pursuant to s. 256 of the National Land Code, the fact that the sale is conducted by the court or its Registrar does not mean that the court or its Registrar has an interest in the sale or any dispute arising therefrom. The Registrar/licensed auctioneer sells the property as an agent of the chargee who is the real vendor.

[62] Therefore, it is our considered view that there is a concluded contract between the appellant and the respondent. This is in accordance with settled law that the order for sale and the conditions of sale constitute a sale and purchase agreement between the respondent being the chargee as the vendor and the appellant being the successful bidder as the purchaser.

[63] We agreed with the appellant's submission that the learned trial judge erred in law when he held that the registered chargee is not liable to pay compensation for losses arising from any judicial sale by public auction by reason of s. 269(3) of the National Land Code. In our considered view, s. 269(3) of the National Land Code does not exempt a chargee from liability for compensation for the losses arising from any judicial sale by public auction. Section 269(3) of the National Land Code, clearly provides *inter alia* that, any chargor or purchaser who suffers any loss of damage by reason of any act, omission, neglect, error or default arising under this Chapter shall be entitled to such compensation as may be determined by the court. Chapter means referring to Chapter 3 on Remedies of Chargees: Sale.

[64] We agreed with the appellant that the learned trial judge erred in law and in fact when he decided that the proclamation of sale made no representation as to the size of the land *per se* but merely set out the particulars of the title. We found the learned judge's finding has no basis because he failed to consider the express terms set out in the proclamation of sale. It is very clear and undisputed that the proclamation of sale showed the size of said land is 94.76 hectares. This was an express term of the contract under the heading of "Butir-Butir Hakmilik" and thus was specifically agreed on between the parties when they entered into the contract. However, the appellant only received 81.9945 hectares and not 94.76 hectares as stated in the proclamation of sale.

[65] The evidence provided by SP3 during the trial was not challenged. The difference in size of the land was confirmed by amongst others, from the physical inspection conducted by the independent consultant appointed by the appellant on the said land. It is also supported by the contemporaneous documents in the form of land survey reports and plan prepared for the land title which was confirmed by the Gombak Land Office. The discovery in different size of land by the appellant was translated into the table as shown

A in the appellant's written submission. The methodology used by the appellant's expert witness, SP3 to calculate the area of the five overlapping lots was not challenged by the respondent during the trial. In summary, the total overlapping land area comprises agriculture land, primary school, primary school/secondary school, secondary school and religious school is
B 12.7655 hectares.

[66] We agreed with the appellant that in this case, the "as is where is basis" principle is not applicable since the particulars of title in the proclamation of sale that the actual size of the land does not correspond with 94.76 hectares as stated in the particulars of title in the proclamation of sale.
C It is also our view that the size of the said land is an express term of the contract. In actual fact, there was evidence of witness (witness statement of Er Ka Wei dated 23 May 2018 (p. 49 of RIP – Vol. 2) that before bidding for the said land, a land search was conducted and all the particulars of title including the size of 94.76 hectares corresponds with the particulars of title
D stated in the proclamation of sale. The appellant's expert witness, SP3 testified that there was no acquisition exercise over the said land, to give rise to the overlapping lots (see: notes of evidence dated 23 May 2018).

[67] We agreed with the High Court's finding in *Azharin Shaari v. Tabung Haji Properties Sdn Bhd*'s case, *supra*, when it was held that, although the land
E was sold on the basis of "as is where is" the area represented for sale was 55.25 acres. It was on that premise, the plaintiff made his offers and subsequently accepted the defendant's offer. It does not lie on defendant to say that "as is where is" meant the plaintiff bought the land represented to be 55.25 acres when it turned out to be 29.5 acres. There is no obligation
F on the plaintiff to do a search on the land size when the offer was clear the area was for 55.25 acres in respect of 688 lots. Further there was no indication at the material time of any master titles. There was nothing to show the land size was other than what was shown in the advertisement and the defendant's offer.

G **[68]** The facts in this case are similar with the above-cited case therefore, it is our considered view that the "as is where is basis" principle does not apply herein because there is nothing to show that the size of the said land is other than what was proclaimed in the proclamation of sale. The respondent had failed to provide the size of said land in accordance with the
H express term stated in the proclamation of sale, that is, 94.76 hectares.

[69] The learned judge in this case held that the doctrine of caveat emptor is applicable in the present case. In our view, the learned judge's decision was not correct. We agreed with the appellant's submission. We found the respondent reliance on condition 6 of the conditions of sale which says that
I "Penawar adalah bertanggungjawab untuk mengenal pasti butir-butir

hartanah dan memastikan segala tanggungan serta bebanan hartanah adalah tepat" does not have merit. We also found the respondent's pleaded case that they are entitled to rely on the professional valuers' report have no merit. The valuation report by SP2, shows the said land bearing titled land area of 94.76 hectares. It was submitted that in this report, it clearly states that Sekolah Kebangsaan Bandar Baru Selayang 2 (Title No: PT35818 HS(D) 35584) forms part of the surrounding land and not the said land. This piece of evidence was unchallenged and/or uncontradicted. Thus, the learned judge should have accepted the evidence (see: notes of proceedings dated 1 June 2018 (pp. 216 to 217 of RIP – supplementary records of appeal).

[70] It is not disputed that in the valuation report which shows the aerial view of the said land confirms that the said school forms part of the said land and this corroborates the appellant's expert witness, SP3's report which is unchallenged and/or uncontradicted. It has been submitted earlier that SP1, as a prudent purchaser had conducted a Registry search on the said land; and conducted a physical inspection on the said land.

[71] "Caveat emptor" is defined as follows:

> The rule is caveat emptor; a purchaser should make inspection and inquiry as to what he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition: and although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.

(See: *Halsbury's Laws of England,* 4th edn., vol 42 at p. 47)

[72] We agreed that the maxim caveat emptor "let the buyer beware" requires that the appellant as the purchaser to be cautious as the risks was his and not that of the respondent. However, the principle of caveat emptor and or "let the buyer beware" would not apply to the factual matrix of this case.

[73] The learned judge held that cl. 23 of the conditions of sale in the proclamation of sale precluded the appellant's claim. This, was on the finding that there was no breach of the condition of sales. However, we did not agree with the learned judge's decision. We agreed with the appellant's submission that this clause is entirely inapplicable. It is not the appellant's case that there were any easements, caveats, tenancies etc in respect of the said land or that the said land was not correctly described. The appellant's

A case is that the said land offered to be sold was of size 94.76 hectares but the appellant only got 81.9945 hectares ie, 12.7655 hectares less (or 13.48% less). There is a breach of condition of sales on the different land area sold to the appellant. Be that as it may, we are of the view that the existence of cl. 23 in the proclamation of sale may be contrary to s. 269(3) of the National B Land Code which clearly provides protection to chargor or purchaser who suffers any loss or damage by reason of any act, omission, neglect, error or default arising from the sale shall be entitled to such compensation as may be determined by the court.

[74] Finally, it is the appellant's case that it has suffered a loss as it C purchased the said land at RM120,000,000 for 94.76 hectares. However, as mentioned above and in actual fact, the appellant only received 81.9945 hectares. The respondent argued that the appellant had failed to present evidence on such loss and damages during trial. We agreed earlier that the appellant is entitled to damages for the loss suffered. In our view, there is D sufficient evidence for arriving into quantum of damages. The computation of the loss suffered can be done simply by way of pro-rating ie, by dividing the purchase price of the said land with the size of the said land, 94.76 hectares which is simple mathematical calculation shown in the table provided by the appellant in their submission above and also in the statement of claim. Based on 20,000,000 (purchase price) = RM1,266,357.11 per E hectare 94.76 hectare (size of the said land) the appellant's loss for the overlapping lots is RM16,165,681.80.

Conclusion

[75] We were satisfied that there are merits in the appellant's appeal. It is F our unanimous decision that the appeal is allowed with costs of RM120,000,00 here and below subject to allocatur. There will be consequential order for the appellant's claim as prayed in the statement of claim. The order of the High Court dated 22 November 2018 was set aside.

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